1937 *Present :* **Abrahams C.J., Maartensz and Soertsz JJ.**

In the Matter of an Application for a Writ of *Habeas corpus* upon the Deputy Inspector-General of Police.

In re MARK ANTONY LYSTER BRACEGIRDLE.

Writ of habeas corpus—*Order in Council of October, 1896—Power of Governor to order a person to quit the Colony—State of emergency—Amending Order in Council of 1916—Power of Courts to inquire into conditions to be fulfilled before the issue of order—Order in Council, October, 1896, s. III., 3.*

The power given to the Governor under Article III., 3, of the Order in Council of October, 1896, to order any person to quit the Colony and, on refusal on the part of such person to obey the order, to cause him to be arrested can be exercised only in a state of emergency contemplated by the preamble to the amending Order in Council of March, 1916.

The nature of the emergency would be a state of war or grave civil disturbance, real or imminent.

***Per* ABRAHAMS C.J.—The Supreme Court is entitled to inquire whether the conditions necessary for the exercise of the power in the Order in Council have been fulfilled.**

***Held also* by the Chief Justice that if the order of the Governor was valid, His Excellency could authorise the Police to effect the arrest.**

THIS was an application for a writ of *habeas corpus* for the production of the body of Mark Antony Lyster Bracegirdle, who was detained by the respondent on an order issued by His Excellency the Governor authorising him to arrest the said Bracegirdle and to place him on board a ship bound for Australia. The arrest was made in pursuance of an order issued by the Governor requiring Bracegirdle to quit the Island within four days, an order which the latter refused to comply with.

Ilangakoon, K.C., A.-G. (with him *Wijeywardene, S.-G.*, and *Pulle, C.C.*), for the Crown.—Mr. Mark Antony Lyster Bracegirdle is produced in obedience to a Mandate issued by Your Lordships' Court. Reads affidavit of Deputy Inspector-General of Police.

The authority under which he is held in custody is a warrant issued under the hand of His Excellency the Governor by virtue of the provisions of clause 3 of Article III of the Order in Council of October 26, 1896, published in the *Gazette* of August 5, 1914, as amended by a later Order in Council of March 21, 1916, published in the *Gazette* of June 5, 1916. By an order dated April 20, 1937, the Governor directed Mr. Bracegirdle to quit the Island on or before April 24, 1937. As that order was not obeyed, the Governor issued a subsequent order for the arrest and deportation of Mr. Bracegirdle. (Reads affidavit from the Secretary to the Governor, Mr. E. R. Sudbury, stating that he was informed by the Governor that the order was issued by him because he was satisfied on the information he had that circumstances had arisen which in the public interest made it necessary for him to act in that way.)

[ABRAHAMS C.J.—What is the purpose ?]

It is merely to show that His Excellency had brought his mind to bear on the matter and that he had the necessary authority for making that

order. My position is that His Excellency has very wide powers given to him under this clause of the Order in Council and under the Order in Council as a whole, and he had full power to make the order in question.

[ABRAHAMS C.J.—Are you going to contend that we cannot inquire into the reasons for the exercise of His Excellency's powers ?]

That will be my submission. Your Lordships will see that the wording of clause 3 is in clear and unmistakable terms. The position taken up by the petitioner is, firstly, that the Governor can only exercise these powers on the arising of an emergency, and secondly, that no such emergency has arisen.

[F. DE ZOYSA, K.C.—I do not know whether the Attorney-General should state his case and I should reply or whether I should state my case first and the Attorney-General should reply.]

[ABRAHAMS C.J.—The Attorney-General has been asked to show cause and he is endeavouring to show cause. The person detaining the body has to show cause why he is taking that course.]

The main contention raised by the petitioner against the validity of this warrant is contained in paragraph 7 of the petition. With regard to the averments in that paragraph my submission would be that the language of clause 3, is perfectly clear, unambiguous and plain ; on a plain reading of the words of that clause, His Excellency had full authority to make the two orders in question. A subsequent Order in Council dated March 21, 1916, amended the 1896 Order in Council in certain respects. The only reference to an emergency was in the recital of the Order in Council of 1916.

[ABRAHAMS C.J.—This was not intended by Her Majesty in Council to remain a permanent addition to the Statute Book—was it ?]

It was intended that it should continue in operation and remain in operation so long as it was not revoked by a Proclamation issued by the Governor declaring that it has ceased to be in operation.

The continuance of its operation therefore is not a matter we can go into.

It is submitted therefore that the Order in Council came into operation on its Proclamation on August 14, 1916, and it has not ceased to be in operation, because no further Proclamation has been issued declaring that it has ceased to be in operation.

[ABRAHAMS C.J.—The whole of the Order in Council indicates the purpose for which it was enacted. Anyone who reads it can appreciate that it is a war-time measure or one to be used in time of grave civil disorder and that it is a complete restriction of the liberty of the subject.]

It can also be brought into force on the apprehension of any danger.

[ABRAHAMS C.J.—What sort of danger ?]

Civil disorder and apprehension of disorder.

[ABRAHAMS C.J.—When was it last brought into force ?]

In 1914.

[ABRAHAMS C.J.— That is during the war. That was a time of emergency when rapid action had to be taken to avoid disorder.]

That is a matter entirely in the discretion of the Governor. The law remains in operation so long as it has not been revoked.

[ABRAHAMS C.J.—I see. So we are all subject to military laws.]

The Governor is not likely to make an irrevocable order. Overriding powers are given to a Governor, but if he abuse them he would be answerable.

The liberty of the subject is a precious thing which all cherish, but the rights of the subject must take second place to the safety of the State. The powers, duties, &c., of a Colonial Governor are derived from his Commission and Royal Letters Patent, Orders in Council, local laws, &c., and a Governor cannot act contrary to the powers given to him. Ceylon is either a ceded or conquered territory, and, in either case, there is the right of the Crown to legislate for it. It is necessary that the supreme power should, subject to certain safeguards, be vested in a person, who is a trusted and experienced officer of the Crown. He is given the fullest responsibility for maintaining the peace and good government of the Colony, subject, of course, to any restrictions in the various instruments restricting his powers.

The elementary principle of Government is that the safety of the State is a matter of paramount concern and every other principle must give way to the safety of the State.

[ABRAHAMS C.J.—But you say that the one body of men who can inquire into the liberty of the subject are precluded from doing so ?]

If there was any infringement of any private right or private liberty, which is seldom likely to occur, there is always an appeal to the Crown through the Secretary of State, and ultimately to Parliament. As to whether an emergency has arisen or not is a matter which cannot be canvassed in a Court of law.

The Court will not investigate the circumstances in which action was taken by the Executive. Certain authority is vested in the supreme power to come to a decision and take a certain line of action. The Court will not try to find out the why and the wherefore of acts which lead to such action being taken.

(Cites *King v. Inspector of Lemen Street Police Station*[1], *King v. Governor of Wormwoods Scrubs Prison*[2], and *Rex. v. Halliday*[3].)

[ABRAHAMS C.J.—That was a time of war.]

But soon after the war, there were certain powers given to the executive as emergency powers.

[ABRAHAMS C.J.—There never was any power to deport a British subject. An alien has always stood under a different footing. There must be some very grave state contemplated before a British subject can be sent away from a British possession.]

The Attorney-General referred to *Halsbury, vol. VI., p. 501* and stated that the executive was given the power to act in any state of emergency, but Parliament must be summoned to meet and consider whether there was sufficient ground for such an order being put into force. Such a situation arose in the general strike when those powers were brought into operation.

[ABRAHAMS C.J.—It was the state of emergency that made the proclamation to be issued and then action could have been taken. Here you have

[1] *(1920) 3 K. B. 72.* [2] *(1920) 2 K. B. 305.*
[3] *(1917) A. C. 260 ; Ex parte Zadig.*

a proclamation issued certainly at a time of grave national peril. That time vanished and it has not begun again ; but the Order in Council is still in existence.]

It is not for us to conjecture what the reason is for continuing the Order in Council in operation. We know that there are no other emergency powers of that description given to the executive to meet situations of emergency. There are certain provisions of the State Council (Order in Council) Article 49 which give the Governor emergency powers of a kind.

[ABRAHAMS C.J.—If it was to be a permanent addition to the Statute Book why should there be a proclamation both as regards bringing it into force and terminating it ?]

It is not intended to be on the Statute Book for ever—it is perhaps a measure which should have been repealed, and, in the opinion of some people, should not be on the Statute Book.

[ABRAHAMS C.J.—We know the office of Governor is a highly responsible one but acts of Governors have been questioned.]

I am aware that they have been questioned both in Courts and elsewhere ; but, if a Governor is required to go into a Court in matters connected with the exercise of his powers of this description and give reasons for the action he took, all the damage will be done—that is why, the Courts will not inquire whether the exercise of the powers have been properly performed or what the grounds are for his decision. As to whether the Governor has acted with wisdom or not is a matter for which he will be answerable to the Secretary of State and through him to Parliament. Where absolute powers are delegated to the executive there is theoretically present the risk of abuse, but the legislature must be deemed to have risked that chance. A Governor is presumed to act reasonably, honestly, and wisely. Those who are responsible for the national security must be the sole judge of what the national security requires. It is submitted that there is no justification for going outside the terms of the Order in Council of 1896, because they would be importing into it other matters of which they had no certain knowledge. The Magna Carta does not apply to Ceylon. The only English law that will be in operation in Ceylon will be that which is brought into force by an Act of Parliament or an Order in Council or by our local law. (Counsel cited *King v. Arnolis* [1].) It is submitted that the preamble of the Order in Council of 1916 cannot modify the terms of the Order in Council of 1896, because the law has to be construed according to the plain and literal meaning of the language used by the legislature. The preamble can only be made use of for the interpretation of an enacting part if there is any ambiguity in it. The preamble cannot restrict or modify clause 3. If the words admit of but one clear and distinct meaning then the language cannot be controlled by the preamble.

[ABRAHAMS C.J.—Why was the preamble inserted if it was not to be regarded ?]

If the intention of the legislature was in any way to restrict the powers of the Governor relating to deportation, there was no reason why that fact should not have been mentioned in clause 3 itself—the provisions of clause 3 are so wide as to enable even a British subject to be deported.

[1] *11 N. L. R, 265.*

The whole object of the power of deportation is to give power to take action to get rid of an undesirable before any serious emergency has arisen. The legislature has allowed such a law to remain in force and it is not the duty of the Courts to inquire into it.

It is submitted that the Court will not call for reasons which justify the executive in making an order of deportation. See *King v. Secretary of States for Home Affairs, ex parte Duke of Chateau Thierry*[1] *where* a French Duke has been dealt with under the Aliens Restriction Act of 1916.

This order was in effect a sort of subsidiary legislation, because the Act of 1916 was itself made by virtue of the powers conferred under the Imperial Act of 1914.

It was not a prerogative Order in Council : it was a statutory Order in Council which the King in Council was authorised to make by an Imperial Act. Our Order in Council of 1896, as well as that of 1916, is a prerogative Order in Council and vests the Governor with power to make an order of deportation in regard to any subject of this Island. In the case of a prerogative Order in Council, it is not possible to inquire whether he had the power or not, because it must be assumed that he had the power. The power of the Courts to inquire into such a matter is itself derived from the same source and the Court will not inquire into the reasons why the King in Council gave the power to do those acts because, rightly or wrongly, that power has been given.

My submission is that the power having been given to the Governor, if the Governor has exercised it within the four corners of that power, Your Lordships' Court will not inquire into the reasons why the Governor exercised his power under that order. (See the judgment of Swinfen Eady L.J.[2].) The Court there held that it was not open to the Secretary of State to order a deportation to any particular country, but that he could order a deportation to any country outside. It was held that the order of deportation was valid and that the Secretary of State was not required to justify his action in a Court of law .The two points decided were, firstly, that the Secretary of State had the power to make the deportation order and, secondly, that the person against whom the order was made was an alien. In this case, Your Lordships' Court will therefore merely inquire whether the person who made this order was the Governor and whether . . . .

[ABRAHAMS C.J.—Can the Court in no case inquire into such an order? Is that your position?]

It can, but only to find out whether it is *ultra vires* or not ; whether it was validly made by the person to whom the power was granted.

[ABRAHAMS C.J.—And nothing beyond that?]

That is my submission.

These are wide powers even bordering on the arbitrary—although the Order in Council was brought into operation on the outbreak of the war—when an emergency had actually arisen as a result of the outbreak of the war, yet it is not contemplated that the Order in Council should cease to be in operation as soon as the war ended ; the Order in Council itself states that it shall continue to be in operation until another proclamation is issued repealing it.

[1] *(1917) 1 K. B. 922.*

[2] *(1917) 1 K. B. 922, at p. 929.*

My submission on this point is that we are not concerned with the reason for the continuance of the operation of the Order in Council although apparently the necessity for it has ceased.

My position is that the Order in Council remains in force until there is a proclamation—a subsequent proclamation—repealing it. If the executive has taken action under it in circumstances not warranting such action, or without justification for it, then the executive will be answerable to the proper authority.

The point is not whether this is a bad law or not. The legislature has thought it fit to vest a discretionary power in the Governor to deport persons. It was so done in the confidence that he—the Governor—would in every case act honestly and fairly. The legislature has taken the risk of passing legislation of this description by reason of the paramount necessity of safeguarding the interests of the public and the State. In the absence of any other legislation—as far as we are aware of—it is not unreasonable to expect legislation of this description to be in existence giving the executive very drastic powers to meet emergencies.

In paragraph 8 of the petition it is alleged that the arrest was illegal, that the Governor had not the power to issue to the Police an order for the arrest of Mr. Bracegirdle, or cause the order to be served or executed by the Police.

May I draw Your Lordships' attention to the fact that under the Letters Patent found in the Government Manual of Procedure, everybody is required to obey and assist the Governor.

[ABRAHAMS C.J.—The Governor might have told you or me or anybody.]

In every country arrests are entrusted as a rule to members of the Police Force.

In reply to the Chief Justice as to the position of the Minister for Home Affairs in relation to the Police, the Attorney-General stated that on this point he would have briefly to survey the constitutional position of Ceylon.

[MAARTENSZ J.—Has the Home Minister to give his consent to every arrest?]

No.

[MAARTENSZ J.—Then why in this case?]

There is no necessity.

[ABRAHAMS C.J.—Suppose the Home Minister refused to permit the arrest of Mr. Bracegirdle what would be the position?]

The authority primarily responsible for the Government of this Island is the Governor and the Governor is vested for the purpose of administering the Island with various powers, duties, &c. The Police Department comes under the Executive Committee of Home Affairs and certain powers are vested in that Executive Committee. A Minister in Ceylon is nothing more than the mouthpiece of his Executive Committee. He is designated a Minister because, as Chairman of that Committee—he is elected by the Committee—the Governor entrusts to him a portfolio and tells him "You shall be my Minister", and the Governor is the person to whom the Minister as such is responsible. There are, therefore, two distinct offices which the Minister holds :

(1) Chairman of the Executive Committee, and
(2) The Governor's Minister under the Constitution.

In the Governor are vested certain powers and functions and under the Ceylon (State Council) Order in Council—the basis of our present constitution—certain subjects and powers which used to be administered by the Governor through the Heads of Departments, prior to the present constitution coming into operation were vested in Executive Committees under Article 32 of that Order in Council.

[ABRAHAMS C.J.—A Minister means a servant. Cabinet Ministers in England are Ministers of the King. Who are the Ministers in Ceylon?]

They are also the King's Ministers in a sense because they are required to take the oath of allegiance to serve the King.

[MAARTENSZ J.—Is any arrest by the Police illegal if the consent of the Minister has not been obtained?]

I do not know what my learned friend's argument will be on that point.

[ABRAHAMS C.J.—You might first hear the arguments of Mr. Perera.]

H. V. Perera, K.C. (*F. de Zoysa, K.C.*, with him *M. T. de S. Ameresekere, B. H. Aluwihare, J. R. Jayawardene,* and *N. M. de Silva*), for petitioner, submitted that his position was that there is a limitation of the exercise of the power by the Governor, and that under the present constitution the order to arrest a person cannot be executed by the Governor without the concurrence of the Home Minister, and that therefore it presumes a certain limitation of power, assuming that the power exists in the Governor, and that the power must be exercised subject to that limitation.

Your Lordships will see that this is a matter vitally affecting the liberty of the subject and the rights of personal freedom and liberty. It has been said by Lord Eldon that with respect to the liberty of the subject, the Courts are there to struggle to secure it, while in this case it is sought to destroy it. (Cites *In re Application of A. R. Shaw for a writ in the nature of habeas corpus* [1].) The learned Attorney-General argues that as long as there is no proclamation withdrawing this Order in Council, that the Order in Council remains in force and that, as it reads, the power given to the executive may be delegated to a Naval or Military Officer, and that the power could be used at the absolute discretion of the authority exercising it in ordering any person at any time to quit the Island, and if the latter failed to do so, he may be forcibly sent out of the Island. Quite apart from the purpose for which the power was exercised any person could be driven away at any time merely because he was considered to be an undesirable. It is not pretended in this case that this order was made because there was a state of emergency or that such a state of emergency was imminent. The Governor in this case has acted merely because that there was this power existing under sub-clause 3 of article III. empowering him to deport any person, for any reason he considered reasonable, and which cannot be canvassed in a Court of law.

If there is such an unlimited power, unlimited by occasion, or by time, then the liberty of the subject does not exist in Ceylon. My contention is that it is limited by reference to purpose, occasion, and time. I do not say, that the King has not the power to legislate in a Colony like Ceylon in spite of the fact that that power to legislate was given to the

[1] *(1861) Ramanathan's Reports 1860-1861, p. 116*

State Council. This is shown in the Dictionary case, *Abeyesekera v. Jayatilaka*[1] where an Act of Indemnity was passed to indemnify an act committed by Sir D. B. Jayatilaka. I agree with the learned Attorney-General that unless there is an Act of Parliament which restricts the power of His Majesty the King, his legislative powers cannot be questioned. Such an act is not necessary in the present case where there are other limitations in respect of taking away from British subjects certain fundamental rights.

It is submitted that the principles laid down in the Magna Carta apply to all British subjects; that the position of a British subject is the same anywhere in the Empire. So far as the general principles are concerned, all subjects owed allegiance to the King who had promised protection, certainly, in respect of the fundamental rights and liberties of the subject. It is a matter in which it can be argued that there is a limitation also on the power of the King to legislate. In the *Dictionary Case*, the Privy Council did not hold that there was no such limitation but that the acts of indemnity are of very frequent occurrence and that the King has the power to indemnify persons who have committed a penalty; but for the King to take away the fundamental right of the subject would be contrary to principle.

My contention is not that this Order in Council is *ultra vires* but that one has to make such limitations as would not destroy the fundamental rights of the subject at all times. The King cannot make laws contrary to the fundamental principles of the British Constitution, for instance, excepting persons from the general laws of the country or granting exclusive privileges to certain individuals. And when a representative Government has been granted to a Colony, the right to such legislation ceases except that here in Ceylon certain matters are specially reserved. (Cites *Constitutional Laws of England (1922), 3rd ed., p. 425.*) A fundamental right which is assured to every British subject as such has in this case been taken away; it destroys the link which binds the subject and the Sovereign—allegiance to the one and the protection to the other. In any constitution, in any law passed by His Majesty, one would not expect to find that it destroys the fundamental rights of the subject. (Reads amending Ordinance of 1916). In this there is no reference to the execution of that power but the delegation of it to a Naval or Military Officer. The learned Attorney-General argues that the Governor is not expected to act unreasonably, or in an unjust manner, but that in itself does not impose a legal limitation on his powers, or that he would not without just cause make such an order. In the same breath, says the learned Attorney-General, the Courts cannot inquire into it but in all cases we have had to deal with, there has been special provision to meet emergencies, or threatened or imminent emergencies. If the power to act in such a way as to interfere with the liberty of the subject is not circumscribed in any way, then there will always be a limited form of allegiance and protection. It may be conceded that to some extent the King could think of legislation which modifies the right to personal liberty in circumstances which will not altogether destroy the right, but, if the power so conceded is unlimited in scope, as to purpose, occasion, and time, and the persons

[1] *(1930) 33 N. L. R. 291.*

in respect of whom it can be exercised, then my humble submission is that such a right cannot simply exist.

[ABRAHAMS C.J.—Is it your contention that the Order in Council is no longer in force ?]

I will argue it alternatively—that the law was brought into being at a time of emergency ; it does not exhaust all British Colonies but places of strategic importance—they may be bases for naval operation in times of war.

[ABRAHAMS C.J.—The Order in Council distinctly states that it remains in force until it is superseded by a subsequent proclamation that it is no longer in force. Do you say that it is in force but with modification ?]

One has, I submit, to look at the whole of it—not in the way the learned Attorney-General interprets it by looking at one particular clause—which is not the way of interpreting any law—if the Governor allowed the Order in Council to remain operative in Ceylon, it must be remembered that it was introduced at a time of emergency, to meet a situation that might be created from such an emergency and the powers have to be invoked in accordance with the circumstances which it was really intended to meet. Whether the powers are unlimited or not, my contention is that the power was conferred for one purpose and I say that powers conferred for one purpose cannot be used for another purpose—that is the fundamental principle in law governing the conferment of powers.

[ABRAHAMS C.J.—What about the present case ?]

In the present case we are told that it was issued in the public interest—not at a time of emergency of which judicial notice can be taken.

[ABRAHAMS C.J.—It has been suggested that the continued presence of this gentleman (Mr. Bracegirdle) might lead to unrest. And it is further suggested that we have no jurisdiction to inquire into this.]

My submission is that the Court has ample jurisdiction to inquire into this matter ; and it is the duty of the Court to inquire into the question whether such a situation had in fact arisen or not.

[ABRAHAMS C.J.—Supposing that in consequence of certain inflammatory observations made by a person, there was distinct evidence of there being unrest or bloodshed, do you still argue that such an order could not have been made ?]

In that case, the Court has to inquire whether there was such a danger of unrest.

[MAARTENSZ J.—May not the Governor act on information received by him if it seemed to him that such a danger was imminent, and that the situation could be saved by the removal of that particular person ?]

The power does not exist to be exercised by the Governor unless there is an emergency, and the Courts have the power to inquire whether such a situation had in fact arisen or not.

[MAARTENSZ J.—Is it not for the Governor to decide whether there is such an emergency?]

No, I submit ; it is for the Court to decide.

[ABRAHAMS C.J.—Your position is that the Governor has not the power to issue this proclamation unless there is a state of emergency and he has not the power to give effect to the terms of this Order in Council unless that emergency exists ?]

That is so.

It is submitted that the fundamental right referred to was secured from principles set out in the Magna Carta and that it did apply to the extent that it was applicable with regard to the rights which are enjoyed by British subjects in any part of the Empire. If there was no limitation as long as that Order in Council remained in force since 1916, no British subject in Ceylon enjoys the fundamental right of British freedom. I would draw your Lordships' attention to the implication of the argument of the learned Attorney-General that so long as it was in force, there was no right of personal liberty in Ceylon. Therefore, there is a very strong presumption that Her Majesty never intended that this Order in Council should be in force whether there was war or not. He does not argue that the Order in Council is *ultra vires* but his submission is that the order is one that must be construed with due regard to fundamental rights.

It is submitted that the Order in Council did not enact any general law, but it only conferred certain powers on the Governor to make regulations. The old clause 3 (1) was repealed in 1916 and there was a substituting sub-clause 1 (A) put in. The old clause 3 (1) did not confer powers on the Governor. It was a time of war and one can well understand such an order coming into force. It is a fundamental rule in construing powers granted by law to have regard to the purpose for which those powers were conferred. The powers cannot be unlimited. If the powers conferred for one purpose are used for another the Courts can inquire into it. (Cites *Maxwell (7th ed.), p. 71.*) If one reads the provisions of the Order together, one comes to the conclusion that they were powers undoubtedly intended to be used not at all times but under special circumstances. A state of emergency must exist, and the Court will find out not what the degree of emergency is, but whether there is an emergency. (Cites a case reported in the "*Citizen*", *Straits Settlements,* also cites *Application for writ of* habeas corpus *for the production of the body of W. A. de Silva*[1].) As in the case of the Parliament, when a law was enacted by Her Majesty in Council giving the Governor great powers, there would also then be such limitations.

[The Chief Justice drew the attention of Counsel to a Privy Council judgment in a Nigerian case—*Eshugbayi Eleko v. The Officer Administering the Government of Nigeria*[2]—where a Native Chief was ordered by the Governor to leave a particular area ; the Native Chief applied for a writ of *habeas corpus* on the ground that the circumstances in which the order was issued did not apply to him.]

Your Lordships will see that in that case power was expressly given to the Governor to deport the Native Chief after he had been removed from office. And in that case, the petitioner questioned both orders—the order to leave—and the order of arrest, on the grounds that he was not a Native Chief and did not hold office and that he was not deposed from office, and that, therefore, the Governor's order was illegal. The Court refused to go into the definition of the term "native chief" which was given rather a loose definition . . . . the case is helpful in that it was held there that the Court had the power to inquire into the conditions precedent to the issue of the order. (Reads extracts from the judgment.) If the Governor acted purely for some private reason, pretending

[1] *(1915) 18 N. L. R. 277.*

[2] *(1931) Appeal Cases 662.*

to act in the public interest, then it will be the duty of the Court to draw off the mask and reveal reality. It may well be an honest mistake . . . .

[ABRAHAMS C.J.—You are distinguishing between abuse and misuse of powers ?]

That is so. If there is a condition precedent to the exercise of a power—either expressly stated or by necessary implication—then the Court can inquire whether that condition precedent to it existed at the time the order was issued. As I submitted, an order might be issued not in the public interest but in the private interest—as a result of perhaps some rivalry between the executive officer and someone else, and it might be proved that such an order is not in the public interest. My contention is that the Courts have the power to find out whether the Governor directed himself properly to the question. I referred to the fact that these powers could be delegated to a Naval or Military officer ; such a delegation becomes necessary only in time of war and not in time of peace. It is clear, therefore, that this clause was meant to be used only in time of war. It is palpable and apparent on the face of it that these powers are powers to be used only at certain times and for certain purposes. Assuming that in Ceylon a person goes about making speeches which are calculated to be detrimental to the prestige of a certain section, will it come under this Order in Council ? Is such an order necessary as a measure of security ? If the expression which occurs in the preamble to the second Order in Council is to be considered, then the question arises as to whether a state of emergency existed at the time the order was made. On the question of the liberty of the subject, Mr. Bracegirdle is an Englishman ; and he is fully entitled to the measure of protection to which an Englishman in England or anywhere else would be entitled. (Refers to the *Articles of Capitulation, 1796*). One of the terms is that the subjects of Ceylon shall enjoy all the liberties and privileges of Her Majesty's subjects. The Courts have played no small part in establishing the liberty of the subject and the final place where these matters are investigated are the Courts. With regard to the existence of the rights, obligations, duties and powers, the Courts are the last Tribunal of Appeal. The Court has the power to investigate the question and say "Well, they have acted legally", and there the matter ends. The Court has the power to ascertain whether such an order was made because it was deemed to be for the public good or for any other reason. If the Court is satisfied that the order was made because the Secretary of State deemed it to be for the public good, then, of course, the Court cannot go beyond that.

[ABRAHAMS C.J.—Supposing a person came forward and filed an affidavit stating that he is prepared to show that an order issued on him was not for the public good but for private reasons, has the Court the power to inquire into it ?]

My submission is that the Court has the power to inquire into the affidavit which has to be answered. Let us take a case where a man says he knows certain things about a particular individual and that he is about to expose that individual, and so an order of deportation has been issued on him, is not the Court going to inquire into it ? Powers are given to be used for certain public purposes and if they are used for private purposes, they can be questioned. My submission has been that

when a power is granted for one purpose, even the *bona fide* use of it for another purpose is an abuse of that power. The recital in the preamble controls the whole situation. What we are really concerned about here is whether the power has been legally used in this case.

If as the learned Attorney-General contends, the Order in Council gives unlimited power to the Governor to deal with persons in that way, what was then the necessity for a specific mention of clause 3 in this Ordinance? The affidavit states that the Governor acted because he thought it is in the public interest to make that order. There was no state of emergency either existing or imminent. And my submission is that except under a proclamation made by the Governor of a state of emergency, when he considers there is one, the powers of the Governor are limited in that the Governor cannot cause the arrest of a person except with the concurrence of the Home Minister.

Where an executive officer is given the power to "cause a man to be arrested" that arrest may be carried out by the Governor ordering a person, who is bound to obey his order to arrest the man. The other way in which it may be done is by ordering a person who is not bound to obey that order, but one who will accede to that order and in that way the arrest is carried out. If the Order in Council stood without any modification of that power by subsequent legislation, it is immaterial to whom the Governor issued that order or request. According to the later Order in Council, this power to cause arrest undergoes a modification in regard to the way in which the power is exercised. The question remains whether the present custody is illegal. It is submitted that the words "incapable of being exercised after the said date" undoubtedly modify certain powers which were vested in the Governor previously and which were in existence at the time the Order in Council became operative.

Counsel cited a case reported in *(1920) 13 K.B. 311; Sarno case*[1]; *Maxwell, pp. 71 and 109*; Maxwell's *Interpretation of Statute (4th ed.), chap. III.*; *The Government of the British Empire* by Prof. Berriedale Keith, (*chap. VII. part I.*)—'The Rule and the Rights of the British Subject'; Walter Pereira's *Laws of Ceylon, p. 38.*

The Governor has been misinformed with regard to the scope of his power and the power has been exercised on the basis that the power was unlimited and can be exercised for any purpose which is desirable.

E. A. L. Wijeyewardene, S.-G., in reply.—When a law is expressed in clear and unambiguous language, there is no rule of construction which enables a Court to refer to the preamble or the history of the legislation or any surrounding circumstances to ascertain the intention of the legislature—see *Willis v. Gipps,*[2] *Salkeld v. Johnston and others,*[3] *Lyall v. Narayanan.*[4]

Article III., 3, of the Order in Council of October 26, 1896, is expressed in very clear language. It is, therefore, not within the province of a Court of law to refer to the preamble of this Order in Council or the amending Order in Council of March 21, 1916, in order to construe the plain meaning of this Article.

[1] *1916 2 K. B. 742.*
[2] *(1846) 13 English Reports (Privy Council) 536; 5 Moo P. C. 379.*
[3] *(1849) 18 L. J. Ch. 493.*
[4] *13 N. L. R. 28 at p. 30.*

A close examination of the various sub-paragraphs of Article III. shows that where the Order authorised the Governor to exercise his powers only when he considered it necessary to do so in connection with the defence of the Colony, it stated so in express terms (*vide* sub-paragraphs (5), (6), and (8)). Sub-paragraph (3) makes no reference to the defence of the Colony and the legislature should be considered to have given unfettered authority to the Governor under that sub-paragraph.

[ABRAHAMS C.J.—Where violence is done to the fundamental principles, is it suggested that one cannot look at the statute as a whole or to anything else to say whether the power has been given untrammeled ?

My submission is that the validity of a colonial law depends on the Colonial Law Validity Act, 1865, and not on the fact of its being in harmony with the principles of the British Constitution—vide *Abeyasekere v. Jayatilaka,*[1] *Dias v. The Attorney General.*[2]

In *Eshugbayi Eleko v. The Officer Administering the Government of Nigeria,*[3] the Eleko contested the validity of the order against him mainly on questions of fact. He contended that he was not a native chief, that he was not deprived from Office and that there was no native law requiring the removal of a chief as referred to in the Deposed Chief's Removal Ordinance of 1917.

Cur. adv. vult.

May 18, 1937. ABRAHAMS C.J.—

This is a case in which a *rule nisi* has been granted for a writ of *habeas corpus.* The subject of the writ, Mark Antony Lyster Bracegirdle, is an English-born British subject. We have heard this case with most anxious care, and I approach the question of our decision with equally anxious consideration as must always be done by His Majesty's Judges where the liberty of the subject is concerned. Mr. Bracegirdle asserts that the Police, through the Governor, have seriously restrained his liberty. On the other hand it is claimed on behalf of the Governor that the restraint of Mr. Bracegirdle's liberty has taken place legally and by reason of an absolute power vested in the Governor. Our duty as Judges in such matters is one which must be discharged with the greatest care. In *Rex. v. Superintendent of Chiswick Police Station, ex parte Sacksteder,*[4] Scrutton L.J. said.

> "I approach the consideration of this case with the anxious care which His Majesty's Judges have always given, and I hope will always give, to questions where it is alleged that the liberty of the subject according to the law of England has been interfered with . . . . This jurisdiction of His Majesty's Judges was of old the only refuge of the subject against the unlawful acts of the Sovereign. It is now frequently the only refuge of the subject against the unlawful acts of the Executive, the higher officials, or more frequently the subordinate officials. I hope it will always remain the duty of His Majesty's Judges to protect those people."

I conceive that it is no less the duty of His Majesty's Judges in this Island to afford the same protection, but I think it is not out of place

[1] *(1930) 33 N. L. R. 291.*
[2] *20 N. L. R. 193.*
[3] *(1931) Appeal Cases 662.*
[4] *(1918) 1 K. B. 578, at p. 589.*

to bear in mind that we must proceed with the utmost impartiality and caution lest we unduly fetter the legitimate action of the Executive.

The facts, so far as they are material for our consideration of the case, are these: On the 21st of last month (April) an order signed by the Governor was served upon Mr. Bracegirdle requiring him to quit the Island on or before 6 P.M. four days later. He omitted to comply with that order, and on the evening of the 7th of this month he was arrested by an officer of Police purporting to act under the authority of the Governor. An actual order was issued by the Deputy Inspector-General, Criminal Investigation Department, which, in addition to authorising the arrest of Mr. Bracegirdle, directed the officer of Police executing the order to place Mr. Bracegirdle on board any ship proceeding from Ceylon to Australia, which Dominion was, it would appear, Mr. Bracegirdle's last place of residence before he came to this Island. The reasons which prompted His Excellency to take this action have not been placed before us in detail, but it is not necessary, for the purposes of our decision, that they should have been. It is, however, notorious that Mr. Bracegirdle was alleged to have comparatively recently expressed his views on certain political and social aspects of life in Ceylon, and there is no harm in assuming that the Governor was of opinion that Mr. Bracegirdle's actions and utterances justified his removal from the Island. That is so far as I need refer to the antecedent facts of the matter. An application for a writ of *habeas corpus* was immediately made on Mr. Bracegirdle's account, and it was submitted that the order of the Governor was *ultra vires.* This order purported to have been made under Article III., 3, of the Order in Council of October 26, 1896, the exact words of which provision I shall presently set out. It was alleged in support of this submission (the case has been mainly fought on the point) that an order under Article III., 3, of the said Order in Council could only be made on the arising of an emergency, and that no such emergency as was contemplated by the Order in Council had arisen, and that even if such an emergency had arisen no order could be made without prior proclamation of the emergency. It was also alleged that the arrest itself is illegal inasmuch as certain constitutional changes brought about by the State Council Order in Council, 1931, precluded the Governor from employing the Police for the purposes of making the arrest. The Order in Council in question was enacted on October 26, 1896. I think that it is desirable to summarise its provisions, and when I reach Article III., 3, I shall give the whole of its text.

Article I. is the enacting Article and it is stated that the Order shall have effect in the Colonies that are specified in the Order in Council—these Colonies are, Malta, St. Lucia, Sierra Leone, Ceylon, Hong Kong, Mauritius, Straits Settlements, St. Helena—and it was to have effect in any of these Colonies when proclaimed by the Governor of such Colony. It was to continue in operation until the Governor issued another proclamation declaring its operation to have ceased.

Article III., 1, places every person within the limits of the Colony under military law, but this provision is replaced by a provision in the amending Order in Council of 1916, to which I shall presently refer.

Article III., 3, which is the provision in dispute, reads as follows :—

"The Governor may order any person to quit the Colony, or any part of or place in the Colony, to be specified in such order, and if any person shall refuse to obey any such order the Governor may cause him to be arrested and removed from the Colony, or from such part thereof, or place therein, and for that purpose to be placed on board of any ship or boat."

Article III., 4, enables the Governor to make any regulations relating to ports and harbours and the movement of ships and boats, which regulations are declared to supersede for the time being any provision of any law in the Colony.

By Article III., 5, the Governor is empowered to require any person to do any work or render any personal service which the Governor may think necessary in connection with the defence of the Colony.

By Article III., 6, the Governor may requisition any animals, vehicles, ships, boats, or any personal property belonging to anybody if the property is required in connection with the defence of the Colony, and if compliance is not made with the requisition the property may be seized.

Article III., 7, enables the Governor to take over for public purposes the buildings or other property including gasworks, electric light works, and water supplies, and if he thinks it necessary for the defence of the Colony he may destroy any buildings or remove any property from one place to another.

Article III., 8, enables the Governor to exercise control over any railway if he thinks it is necessary in connection with the defence of the Colony.

Article III., 9, empowers the Governor to seize food supplies, fuel, and mineral oils, and to sell them and to pay the proceeds into the Treasury.

Article III., 10, enables the Governor to control food prices by proclamation.

Article III, 11, enables the Governor when he thinks it necessary for the defence of the Colony to control the trade in intoxicating liquors.

Article III., 12, is a compensation provision for property seized and destroyed.

Article III., 13, provides a Board to consider compensation or remuneration for work done or property seized.

Article III., 14, is ancillary to Article III., 13.

Article III., 15, enables any person authorized by the Governor in writing to enter upon any land or house and examine and inspect it, and, if necessary, to use force to effect such entry.

Article III., 16, provides for the conviction and punishment of persons who fail to comply with any order or requisition, or hinders the carrying out of any order or requisition.

Article III., 17, relieves any person from the consequences of any breach of contract which he may have committed in consequence of having obeyed any order or requisition.

Article III., 18, enables the Governor to issue a proclamation postponing the payment in respect of rent or other moneys due and payable,

and the period of maturity of negotiable instruments, and enables him to suspend for any period of time the execution of the judgments of Civil Courts and the enforcement of their processes, if he considers that "owing to circumstances arising out of the state of war or the immediate apprehension of war, the immediate execution of such judgments or enforcement of such process would be inequitable or inexpedient."

This Order in Council was not brought into operation until a proclamation of August 5, 1914, declared that it came into operation, and in the same *Government Gazette* in which this proclamation was published there was another proclamation declaring a state of war between Great Britain and the German Empire.

On March 21, 1916, an Order in Council was passed amending the Order in Council of 1896, by substituting for Article III., 1, that is to say, the Article declaring all persons in the Island subject to military law, an extensive provision to enable the Governor to make regulations for the public safety and the defence of the Colony, and providing for many matters in connection with these purposes, but it is not necessary to enumerate all these. The preamble to this Order in Council reads as follows :—

> "Whereas by an Order in Council dated the 26th day of October, 1896, (hereinafter referred to as the principal Order) Her Majesty Queen Victoria was pleased to make provision for the security of the Colonies mentioned in the schedule to that Order in times of emergency."

It was further declared that the amending Order was to be construed and read as one with the Order in Council of 1896.

Now in answer to an affidavit supporting the application for a writ of *habeas corpus* which repeated the objections to the validity of the Governor's order, which I have detailed above, an affidavit was put in on behalf of the Crown which was sworn by the Secretary to His Excellency and which alleged that the order of the Governor on which the arrest was effected was made in the public interest. The learned Attorney-General, in showing cause against the Rule, argued strenuously that Article III., 3, gave the Governor absolute power to make the order. That is to say, he contended that the Courts had no authority to inquire into the circumstances under which the order was issued. He emphasized what he described as the clear unambiguous words of Article III., 3, and in reply to the contention on behalf of Mr. Bracegirdle that the order of the Governor could be issued only in times of emergency, he argued that although this expression "times of emergency" occurred in the preamble to the amending Order in Council, 1916, and although the amending Order is to be read as one with the principal order, seeing that the words in Article III., 3, were clear and unambiguous they could not be controlled in any way by the words of the preamble. He pointed out that the proclamation of August 5, 1914, had never been revoked, and that in view of Article I. (the enacting Article of the Order in Council of 1896) to the effect that the Order in Council was to remain in force until revoked, by a subsequent proclamation, which proclamation had not been issued, it was conclusive that, whatever circumstances might be existing, and however much the continuance in operation of

the Order in Council might be criticised, the fact that the Order was in operation and that the words of Article III., 3, are clear and unambiguous gave the Governor the powers which he had exercised and which he claimed were beyond the scrutiny of the Court.

Now this power claimed by the learned Attorney-General is a very wide power, and if the legitimacy of the claim is admitted it means that from August 5, 1914, right down to the present day, then in the words of Mr. Perera, who appeared in support of the Rule, there has been in contemplation of law no personal liberty in Ceylon. It is said by the learned Attorney-General that executive officers who have extreme powers conferred upon them are assumed to exercise these powers prudently and justly. That is no doubt true but Mr. Perera, however, points out that it is not a question of what the Governor is likely to do, but it is a question of what he can do, and that in order to see whether it was intended that absolute powers in respect to this or any other provision of the Order in Council have been conferred upon the Governor the remaining provisions of the Order in Council should be looked at. There is strong authority to the effect that the Legislature does not intend to interfere with existing law and that it would require clear and unmistakable language to dislodge that presumption. In Chapter III., *Maxwell on "The Interpretation of Statutes" (4th ed.), p. 132,* the following passage occurs :—

> "It is in the last degree improbable that the Legislature would overthrow fundamental principles, infringe rights, or depart from the general system of law, without expressing its intention with irresistible clearness ; and to give any such effect to general words, simply because they have that meaning in their widest, or usual, or natural sense, would be to give them a meaning in which they were not really used. General words and phrases, therefore, however wide and comprehensive in their literal sense, must be construed as strictly limited to the actual objects of the Act, and as not altering the law beyond."

There can be no doubt that in British territory there is the fundamental principle of law enshrined in Magna Carta that no person can be deprived of his liberty except by judicial process. The following passage from *The Government of the British Empire* by Professor Berriedale Keith, is illuminating and instructive. In Chapter VII. of Part I., he discusses "The Rule of Law and the Rights of the Subject " p. 234. He says :—

> "Throughout the Empire the system of Government is distinguished by the predominance of the rule of law. The most obvious side of this conception is afforded by the principles that no man can be made to suffer in person or property save through the action of the ordinary Courts after a public trial by established legal rules, and that there is a definite body of well known legal principles, excluding arbitrary executive action. The value of the principles was made obvious enough during the war when vast powers were necessarily conferred on the executive by statute, under which rights of individual liberty were severely curtailed both in the United Kingdom and in the oversea territories. Persons both British and alien were deprived legally but

more or less arbitrarily of liberty on grounds of suspicion of enemy connections or inclinations, and the movements of aliens were severely restricted and supervised; the courts of the Empire recognized the validity of such powers under war conditions, but it is clear that a complete change would be effected in the security of personal rights if executive officers in time of peace were *permitted* the discretion they exercised during the war, and which in foreign countries they often exercise even in time of peace."

It is therefore contended on behalf of the Crown in this case that that principle to which I have referred above can be definitely abrogated at the will of any Naval or Military authority to whom he delegated his Governor under Article 4 of the amending Order in Council of 1916, at the will of any Naval or Military authority to whom he delegated his powers. This is indeed a startling proposition. It implies that, to use the words of Lord Atkinson in *Rex v. Halliday*[1] (a case which the learned Attorney-General appeared to think supported him) "the personal liberty of the subject can be invaded arbitrarily at the mere whim of the Executive."

The learned Solicitor-General, who replied on behalf of the Crown to Mr. Perera's submissions, argued that it was incumbent upon the Court to consider Article III., 3, by itself. He was entirely unable to justify this submission in view of the rule of construction that the whole of an enactment must be considered in the construction of any of its parts. It was said in the very ancient case of *Lincoln College's Case*[2] that "the office of a good compositor of an Act of Parliament is to make construction on all the parts together and not of one part only by itself"; and Tanfield J. said in the almost equally venerable *Chamberlain's Case*[3] "As a will ought to receive construction by due consideration of the intention of testator collected out of all the parts of the will, so the meaning of an Act of Parliament ought to be expounded by an examination of the intention of the makers thereof collected out of all the clauses therein so that there be no repugnance but a concordancy in all the parts thereof." An examination of the whole of the Order in Council of 1896, with its many references to things done through a state of war, or done in connection with or in aid of the defence of the Colony; with its requisitions of food and fuel; its references to the seizure, use of and destruction of public buildings; its control of railways, lighting stations and the water supply, make it overwhelmingly obvious that these extraordinary measures brushing aside the ordinary law of the land, suspending payment of debts and excusing persons affected by the regulations from performing contracts must be employed only in times when the National security must be provided for by such extreme measures, and it is equally obvious that this threat to National security must be by the very language of the Order real or apprehended state of war or widespread civil disorder.

No authority has been cited to me by the learned law officers to justify me in separating and interpreting one single provision of the Order in Council apart from its companions. It is inconceivable that

[1] *(1917) A. C. 260 at 271.*

[2] *(1595) 76 E. R. 764.*

[3] *(1610) 145 E. R. 346.*

the Sovereign in Council would have mixed up a number of subjects and conferred some powers upon the Governor which, as the Solicitor-General finally admitted, could only be used to meet war or a threat of war or be exercised in the interests of the defence of the Colony, while others like those in Article III., 3, enabling deportation, and those in Article III. 4, enabling the exercise of complete control over shipping to be exercised, and those in Article III., 15, enabling any house or building to be entered upon, were to be exercisable at will and at large. It is obvious to me that the Sovereign in Council intended one of two things, (and this seems to me to be necessarily implied by the words of the enacting Article in the Order in Council), namely, that either the Order in Council is to be brought into effect by proclamation at a time when the National security is likely to be in danger by some widespread activity such as war or extensive civil disorder, and that when the National security is no longer imperilled by the state of affairs then the proclamation should be revoked; or that the Order in Council when once proclaimed should remain in force indefinitely but no powers should be exercised under it unless called for on account of an emergency of the kind indicated above. I incline to the former view because I think it is more consistent with the actual text of the enacting clause, for otherwise there would have been no purpose in empowering the Governor to bring the Order in Council into effect by means of a proclamation. This question was in point of fact considered by Barret-Lennard J. in a case tried in Singapore in 1922, in which the scope of Article III., 3, came under consideration. A verbatim newspaper report of this case has been handed to us. Barret-Lennard J. was of opinion that the Order in Council, affecting as it did places which were all of strategic importance, was intended to refer to war and to war only, and he said in very strong language that when the Great War which caused the Order in Council to be proclaimed in the Straits Settlements (as it was in Ceylon) had terminated, the Governor was not justified in keeping the Order in Council in operation, and he went so far as to say that the Order had expired not later than the time when the Central Powers resumed friendly relations with Great Britain in consequence of the various Peace Treaties. I confess that I am rather impressed by his reasoning, but it is not necessary for me to go so far as to say that I am in agreement with it since I am of the opinion that no powers can be exercised under the Order in Council unless an emergency of such a kind as is contemplated by the terms of the Order in Council be real or imminent.

A great deal of argument has been addressed to us on the subject of the powers of the Courts to scrutinize the powers of the executive when conditions under which these powers are to be exercised have been attached to these powers by the various enactments conferring them, and a number of cases have been cited to us the great majority of which have dealt with applications for *habeas corpus* made by persons British or alien in respect of the exercise of powers conferred on the Home Secretary by war time legislation. But the point in this case is whether the power of the Governor to issue an order under Article III., 3, of the 1896 Order in Council is absolute or not. It is contended that it is absolute—unconditioned by time, occasion, or circumstance. I am of

the opinion that it is not absolute and that the power may be exercised only under conditions. It was not stated in the affidavit of His Excellency's Secretary that the issue of the order was justified because a state of emergency existed and that the conduct of Mr. Bracegirdle justified the action which was taken in view of the emergency. Had that been advanced in argument I should have nevertheless held that we are entitled, and indeed we have a duty to inquire as to whether the conditions which must be satisfied before power granted to an executive officer can be exercised have been fulfilled. What shall satisfy a Court in such behalf I am not prepared to say, but I do think it appropriate to state that the Courts have such powers of inquiry. This was said in unmistakable terms in the Privy Council case of *Eshugbayi Eleko v. The Officer Administering the Government of Nigeria*[1]. The Supreme Court of Nigeria had held that the Judges had no power to inquire into certain conditions that had to be fulfilled before the Governor of Nigeria could issue an order requiring a native to remove himself from one part of the Colony to another, and Lord Atkin, at page 670, said:—

> "Their Lordships are satisfied that the opinion which has prevailed that the Courts cannot investigate the whole of the necessary conditions is erroneous. The Governor acting under the Ordinance acts solely under executive powers, and in no sense as a Court. As the executive he can only act in pursuance of the powers given to him by law. In accordance with British Jurisprudence no member of the executive can interfere with the liberty or property of a British subject except on the condition that he can support the legality of his action before a Court of justice."

But we are, however, absolved from considering any question as to whether the conditions attached to the exercise of the Governor's powers under the Order in Council have been fulfilled because, as I have said, it is not maintained that they have been so fulfilled. The Crown takes its stand upon what it submits are the unquestionable absolute powers of the Governor, and it is our duty to say that those powers are limited. The question whether it would be in the public interest that Mr. Bracegirdle should leave the Colony is not to the purpose. Were he an alien, that question might be one for decision under section 5 of "The Supervision of Aliens Ordinance, No. 14 of 1917", but he is not, and we have to decide his rights as a British subject.

In my opinion then the Governor's order purporting to be made under Article III, 3, of the Order in Council of 1896, was made without authority. The arrest and detention are illegal and Mr. Bracegirdle must be released.

In view of my opinion that the order of the Governor is invalid, an opinion with which I understand my brother Judges will express concurrence, it is not necessary for us to give a decision upon the second ground on which it is contended that the arrest and custody by the Police are illegal. But I think it fit to say that I am of opinion that had I held that the order of the Governor was valid, I should have rejected the submission that he is disqualified from employing the Police

[1] *(1931) Appeal Cases 662.*

to effect the arrest which he is authorised to cause. This I am able to say without going into the question as to whether the State Council Order in Council precludes the Governor from issuing orders to the Police. Whether it does or does nòt is not to the purpose, since there is nothing to prevent the Governor from requesting the Police to effect the arrest which he is authorised to cause.

MAARTENSZ J.—

On April 20, 1937, His Excellency the Governor purporting to act in pursuance of the power vested in him by clause 3 of Article III. of an Order in Council dated October 26, 1896, ordered Mark Antony Lyster Bracegirdle (hereafter referred to as Bracegirdle) to quit the Island of Ceylon on or before 6 P.M. on April 24, 1937.

Bracegirdle refused to obey the order, and His Excellency in pursuance of the powers vested in him by the said clause directed the Deputy Inspector-General of Police, Criminal Investigation Department, or any Police Officer authorised by him in writing to arrest and remove Bracegirdle forthwith from the Island.

Bracegirdle was arrested on May 7, 1937, by Inspector Kelaart, who had been authorised to arrest him.

The petitioner makes this application as a friend of Bracegirdle.

The petitioner submits—(*a*) that "an order under clause 3 of Article III. of the Order in Council of October 26, 1896, can only be made on the arising of an emergency, that no such emergency as contemplated by the said Order in Council has arisen, that no such order can be made without prior proclamation of such emergency"; (*b*) That "the said arrest was illegal and unwarranted inasmuch as His Excellency the Governor had not in law power to issue (to) the police the said order dated April 20, 1937, or the said order of arrest dated May 7, 1937, or to cause either of the said orders to be served or executed by or through the police".

The Attorney-General who showed cause against the application contended—(*a*) that clause 3 of Article III. gave the Governor unquestionable power to order a person to quit the Island and that the power could be exercised whether there was an emergency or not, (*b*) that if the power could be exercised only in an emergency it was not open to the Court to inquire whether there was an emergency much less as to the nature of the emergency.

I do not think that the alternative contention is open to the Attorney-General because the affidavit filed by him sworn to by the Secretary to the Governor does not allege that there was an emergency which necessitated the making of the order. The petitioner's allegation "that no such emergency as is contemplated by the said Order in Council has arisen" stands uncontradicted.

It is in my opinion therefore unnecessary to examine in detail the numerous authorities cited to us regarding the power of the Court to inquire whether there had been an abuse or misuse of the power under which an order affecting the liberty of a person was made.

In the case of *The King v. Inspector of Leman Street Police Station, ex parte Venicoff,*[1] the Secretary of State "in pursuance of the powers conferred by the Aliens Restriction Act, 1914, Article 12, made order that Samuel Venicoff . . . . shall be deported from the United Kingdom . . . . and directed that from and after the service of this order upon the above-named alien he shall, until he can be conveniently conveyed to and placed on board the ship on which he is to leave the United Kingdom, and whilst being conveyed to the ship and until the ship finally leaves the United Kingdom, be in custody of the constable or other officer charged with the duty of enforcing this order".

In pursuance of that order Venicoff was detained in custody. Thereupon he applied for *rules nisi* for *habeas corpus* and *certiorari* directed respectively to the Inspector of Leman Street Police Station and to the Secretary of State for Home Affairs.

Article 12 reads as follows:—"The Secretary of State may, if he deems it to be conducive to the public good, make an order (in this Order referred to as a deportation order) requiring an alien to leave and to remain thereafter out of the United Kingdom . . . . .".

On return to the rules an affidavit by Sir John Pedder, an Assistant Secretary in the Home Office, was read which set out the grounds upon which it appeared to the Home Secretary that the applicant was a man against whom it was conducive to the public good that a deportation order should be made.

The Earl of Reading C.J. said in the course of his judgment, "Turning now to the statute, Art. 12 and the deportation order made under it, I have no doubt that it is not for us to pronounce whether the making of the order is or is not conducive to the public good. Parliament has expressly empowered the Secretary of State as an executive officer to make these orders and has imposed no conditions". This dictum and the decisions in the cases of *Rex. v. Brixton Prison (Governor), ex parte Sarno*[2]; *Rex v. Secretary of State for Home Affairs, ex parte Duke of Chateau Thierry*[3]; *Rex v. Halliday*[4]; and *The King v. Governor of Wormwood Scrubbs Prison*[5]; would have had to be examined as well as the case of *Eshugbayi Eleko v. The Officer Administering the Government of Nigeria*[6] if an emergency had been alleged in the affidavit filed by the Secretary to the Governor. As I have already said there is no such allegation and the only question which in my judgment arises for decision is whether the Governor's power to make an order under clause 3 is unfettered or whether he could only make the order on an emergency which effects the safety of the Island and which could be met by the deportation of Bracegirdle.

It is necessary for the determination of this question to consider the circumstances in which the Order in Council was made and proclaimed in the Island and to examine the various clauses of the Order.

The Order was made by Her Majesty Queen Victoria in Council on October 26. 1896. It enacts that the Order "shall apply to and have effect in all or any of the Colonies specified in the schedule hereto in which it shall be proclaimed by the Governor of the Colony, and shall

[1] *(1920) 3 K. B. 72.*
[2] *(1916) 2 K. B. 742.*
[3] *(1917) 1 K. B. 922.*
[4] *(1917) A. C. 260.*
[5] *(1920) 2. K. B. 305.*
[6] *(1931) Appeal Cases 662.*

come into operation in each such Colony on being so proclaimed therein, and shall continue in operation therein until the Governor shall by proclamation declare that it has ceased to be in operation therein ".

The Colonies specified in the schedule are Malta, St. Lucia, Sierra Leone, Ceylon, Hong Kong, Mauritius, Straits Settlements, and St. Helena.

The order was proclaimed in Ceylon on August 5, 1914, that is on the outbreak of the Great War.

The Order in Council dated October 26, 1896 (hereafter referred to as the principal order) was amended by Orders in Council dated August 28, 1914, and March 21, 1916. These were proclaimed in the Island on October 7, 1914, and June 5, 1916.

The Principal Order did not specify the purpose for which it was enacted. But the amending Order dated March 21, 1916, sets out the purpose in a preamble in the following terms—" Whereas by an Order in Council dated October 26, 1896, (hereinafter referred to as the Principal Order) Her Majesty Queen Victoria was pleased to make provision for the security of the Colonies mentioned in the schedule to that Order in times of emergency ".

The petitioner contended that the preamble limited the powers conferred on the Governor by the Principal Order and the amending Order to " times of emergency "; and that the times of emergency contemplated by the principal Order were such as would arise in times of war or possibly grave civil disturbances.

The reply to this contention was that where the terms of a section are plain and unambiguous it is a rule of construction that a Court is not entitled to refer to the preamble, or the history of the legislation or surrounding circumstances in construing the section. In support of this argument we were referred to the cases of (1) *Willis v. Gipps* [1]. The Act in question was the Colonial Leave of Absence Act, 1782 (c. 75). The preamble of the Act recited the mischief of granting colonial offices to persons who remained in England and discharged the duties of their offices by deputy. It was held that the preamble did not exclude judicial offices from the general enacting part, which authorised the Governor to remove 'any' office holder for misconduct, although the mention of delegation in the preamble showed that the judicial office was not there in contemplation. Full effect was given in the decision to the word 'any'. (2) *Rex v. Brodribb* [2] where it was decided that the preamble to the Oaths Act, 1797 (c. 123), which refers only to the mischiefs consequent on inciting men to sedition and mutiny, and on administering to them oaths with this object, did not restrict the enacting part of the statute, which made it felony to administer oaths with a view not only to mutinous or seditious purposes, but also to disturbing the peace; or to be a member of any such association for any such purpose or not to reveal any unlawful combination or illegal act; it being held that the latter words included offences foreign to politics and military discipline, such as the administration of oaths to poachers not to betray their companions.

[1] *(1846) 13 English Reports (Privy Council) 536; 5 Moo. P. C. 379.* [2] *(1816) 6 C. & P. 571.*

The enacting part considered in these cases contained words which extended the provisions beyond the preamble. If clause 3 contained words of a similar character effect would have to be given to them however drastic that effect may be.

The clause reads as follows:—"The Governor may order any person to quit the Colony, or any part of or place in the Colony, to be specified in such order, and if any person shall refuse to obey any such order the Governor may cause him to be arrested and removed from the Colony, or from such part thereof, or place therein, and for that purpose to be placed on board of any ship or boat".

In my judgment there are no words in the clause which indicate that an order can be made in pursuance of the powers conferred by it at any time and for any purpose.

It was also contended against the rule being made absolute that the preamble was not a part of the principal Order. I do not think that a sound contention. Where the preamble of an amending enactment specifies the reason for the enactment of the principal act we are entitled to look at the preamble for the purpose of determining the scope of the principal act.

The petitioner next contended that the Order in Council must be read as a whole in order to ascertain the true meaning of its several clauses, and that if it were so read it would be manifest that the power conferred by clause 3 could only be exercised in time of war or grave civil disturbance.

Article III. of the Principal Order in Council enacts that "so long as this Order shall be in operation in any Colony the following provisions shall have effect". The provisions are embodied in eighteen clauses. The first clause provided that every person within the limits of the Colony shall be subject to military law for the purposes of the Army Act. The Order in Council dated March 21, 1916, substituted for clause 1 a clause empowering the Governor to make regulations for securing the public safety and the defence of the Colony. The second clause provided that any declaration made by the Governor under section 189 of the Army Act shall be deemed to apply to every military force raised in the Colony. The 3rd, 4th, 5th, 6th, 7th, 8th, 9th, 10th, 11th and 18th clauses empower the Governor to order any person to leave the Colony, to make regulations or orders respecting any port or harbour in the Colony, to requisition the services of any person, to requisition any animals, vehicles, ships, boats, &c., to take possession of buildings or other property (including gasworks and works for the supply of electricity), waterworks, wells, &c., to requisition the resources of any railway, to seize and take possession of articles of food and fuel, to prescribe the maximum price at which articles of food may be sold, to take steps to control the trade in beer, wine and spirits, to extend the time for the payment of rent or other money and the maturity of bills and to suspend the execution of judgments.

Clause 15 empowers any person authorised by the Governor to enter upon and examine any land or building.

Clauses 3, 4, 9, 10, and 15 do not state in express terms as the other clauses do that the powers are to be exercised in aid of or in connection

with the defence of the Colony. But having regard to the nature of the powers they confer and the other clauses in which the exercise of the powers is limited to the defence of the Colony and the first clause which places every person under military law, I am of opinion that the powers conferred by clauses 3, 4, 9, 10, and 15 were only to be exercised when the defence or safety of the Colony required it.

In the cases which arose in England from orders made under the Defence of the Realm Act the Judges laid great stress on the fact that the orders were made in exercise of powers conferred on the executive in a time of great danger resulting from the war in which England was engaged.

The Order in Council was, I have no doubt, proclaimed on August 5, 1914, to meet exigencies arising from a state of war. The fact that it had not been repealed after the war terminated would not justify the exercise of powers which could properly be exercised only at a time of great public danger.

I am of opinion having given the matter my anxious consideration that clause 3 cannot be read as a separate clause conferring on the Governor the right, unfettered by any condition to order any person to quit the Colony at any time. It must be read with the other clauses of the Order in Council for the purpose of determining the extent of the powers conferred by it; read in that way it is to my mind manifest that the power to order a person to quit the Colony could only be exercised in times of emergency. The nature of the emergency in view of the other provisions of the Order in Council could only be a state of war or grave civil disturbance.

It is not claimed that the order dated April 20, 1937, was made in such an emergency.

I am of opinion, therefore, that the order was not authorised by clause 3 and that the arrest and detention of Bracegirdle are illegal. He must accordingly be released.

SOERTSZ J.—

I have had the pleasure and the advantage of reading the judgments of My Lord the Chief Justice and of my brother Maartensz, and I agree that the *order nisi* granted by this Court must be made absolute and Mark Antony Lyster Bracegirdle released. The facts of this case have been already fully stated and I abstain from repeating them. But in view of the importance of the questions of law involved in this application I wish to make a few observations myself on them.

The Law Officers of the Crown sought to justify the orders made by His Excellency the Governor under clause 3 of Article III. of the Order in Council dated October 26, 1896, by virtue of which the Governor purported to act. I agree with them that this clause read by itself appears to give His Excellency an absolute and unlimited power to make the orders relied upon. But I am unable to agree with their contention that that clause should be separated from the other clauses of the Order in Council and considered by itself. Such a course is opposed to well known and fundamental rules of legal interpretation which require Statutes that grant powers "to be construed as strictly limited to the actual objects of the Statutes and as not altering the law beyond";

"to make construction on all parts together and not of one part only by itself". The trite legal maxim in regard to the interpretation of each clause in a Statute is "*noscitur a sociis*". Moreover,, in this particular instance, the Order in Council of 1896 provides for the whole of it applying and having effect on its being proclaimed by the Governor. There is no provision for its being called into operation piecemeal.

If then clause 3 of Article III. is read with reference to the other clauses and Articles in the Order in Council we are driven to the conclusion that this Order meant to invest the Governor with extraordinary powers for the defence of the realm and for the security of the Colony *in time of emergency*. In such time, it is possible to condone acts which in the words of Lord Reading "would, in truth, shock the majority of persons in the country in time of peace". That this was the intention of Her Majesty and that she "never intended to construct an instrument of violent and arbitrary power" is elucidated by the preamble to the Order in Council of March 26, 1916, by which the principal Order in Council of 1896 was amended; it expressly declared that "whereas Her Majesty Queen Victoria was pleased to make provision *for the security of the Colonies* mentioned in the schedule to that Ordinance *in times of emergency*, &c., it was further provided that this amending order "should be construed and read as one with the principal order". Moreover, the fact that these Orders in Council enacted temporary measures is borne out by the clause in the principal order which provided for their coming into operation on being proclaimed by the Governor of the Colonies concerned and remaining in force until the Governors declared that they had ceased to be in operation.

At this stage, I would address myself to the argument [addressed] advanced by the law officers that inasmuch as these Orders in Council were brought into operation they are effective and afford authority and justification for His Excellency's orders. No doubt, these Orders in Council are in operation in the sense that they have not been revoked but they cannot be applied or made effective in the absence of the conditions on which their valid functioning depends. Those conditions are two-fold and concomitant—the security of the Colony and times of emergency. Now in this case, the affidavit of the Secretary to His Excellency the Governor which was put before us states, "I am informed by His Excellency that the said orders were made because His Excellency was satisfied on the information available to him that circumstances had arisen rendering it necessary in the public interest to make the said orders". But that, if I may say so respectfully, is insufficient for even if we regard the phrase 'in the public interest' as an exact equivalent of the phrase in the Order in Council 'the security of the Colony', only one of the necessary conditions is satisfied by that declaration. As pointed out by my brother Maartensz the averment in the petitioner's affidavit 'that no such emergency as is contemplated by the Order in Council has arisen' has not been contradicted.

Therefore, the second condition for the lawful exercise of the powers given to His Excellency by clause 3 of Article III. is wholly absent and the orders made by His Excellency in pursuance of those powers are, in my opinion, *ultra vires*.

Another point was taken on behalf of the petitioner, namely, that His Excellency's order issued to the Deputy Inspector-General of Police directing the arrest of Bracegirdle was bad in law because it was issued without the concurrence of the Minister for Home Affairs.

We were earnestly pressed to consider this question and to give our ruling on it. But, I respectfully agree with the Chief Justice that the conclusion we have reached on the first matter absolves us from the necessity of considering an academic question.